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No. 90-747

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

UNITED STATES DEPARTMENT OF STATE, *Petitioner,*

v.

MICHAEL D. RAY, Individually and as attorney for certain Haitian political asylum applicants, IVES AUDATE, JEAN HEVIL LOISEAU, and YVON NICOLAS, on behalf of themselves and all others similarly situated, *Respondents.*

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In order to conceal violations of international and domestic law regarding the humane treatment of political refugees, may the State Department engage in a public disinformation campaign through the media to cover up its systematic breaches and then to further the cover-up, classify documents contrary to Executive Order?

2. May the government evade its obligations to disclose documents when ordered to do so under the Freedom of Information Act by withholding its most powerful cannon - a claim of "national security" exemption - and then springing it on surprised opponents and the judge after the trial court has denied its other exemption claim?

PARTIES TO THE PROCEEDING BELOW

The parties in the Court of Appeals included the following:

1. As identified in the caption of this document, Respondents were plaintiffs below. Although three named plaintiffs sought to certify this as a class action to include all other similarly situated Haitian political asylum applicants, their motion was denied.

2. Defendants in addition to Petitioner United States Department of State included the United States Department of Justice, Immigration and Naturalization Service; and the Executive Office for Immigration Review, Office of the Immigration Judge. Those parties are not before this Court.

TABLE OF CONTENTS

	Page
Questions Presented	I
Parties to the Proceeding Below	II
Statutory and Regulatory Provisions Involved	2
Statement	3
Reasons for Denying the Writ	12
Disinformation & Propaganda Program Improper for National Defense-Foreign Policy Exemption	13
Executive Order Outlaws Cover-ups Like State Department's	15
The Eleventh Circuit's Balancing of Public Interest Against Privacy Interest Requires No Further Review	17
The Alleged Pledge: "Confidentiality"	19
"Conflicting" Decisions Do Not Conflict	19
The Eleventh Circuit Properly Determined State Department's More Than Two-Year Delay In Asserting Exemptions Amounted To A Waiver	22
Ample Opportunities Will Exist For This Court To Revisit The Issues Presented Here After Other Courts Consider And Apply The Recent *Reporters Committee* Decision	24
Conclusion	26

TABLE OF AUTHORITIES

Cases: **Page:**

Chilivis v. Securities and Exchange Comm'n, 673 F.2d 1205 (11th Cir. 1982) 11

Dep't of Air Force v. Rose, 425 U.S. 352 (1976) . 17, 18

Dep't of Justice v. Reporters Committee for Freedom of the Press, 109 S. Ct. 1468 (1989) 13, 24, 25

EPA v. Mink, 410 U.S. 73 (1973) 14, 16, 23, 25

FLRA v. Dep't of the Treasury, 884 F.2d 1446 (D.C. Cir. 1989) *certs. denied*, 110 S. Ct. 863, and 864 (1990) 20

Gravel v. United States, 408 U.S. 606 (1972) 14, 16

Grummman Aircraft Engineering Corp. v. Renegotiation Board, 482 F.2d 710 (D.C. Cir. 1973) 11

Heights Community Congress v. Veterans Administration, 732 F.2d 526 (6th Cir.) *cert. denied*, 469 U.S. 1034 (1984) 20

Jordan v. Dep't of Justice, 591 F.2d 753 (D.C. Cir. 1978) 10, 23, 24

Nat'l Ass'n of Retired Federal Employees v. Horner, 879 F.2d 873 (D.C. Cir. 1989) *cert. denied* 110 S.Ct. 1805 (1990) 19, 20, 24

Cases - Continued: **Page:**

Perry v. Block, 684 F.2d 121 (D.C. Cir. 1982) 21

Senate of the Commonwealth of Puerto Rico v. Dep't of Justice, 823 F.2d 574 (D.C. Cir. 1987) . . 11

Washington Post Co. v. U.S. Dep't of Health and Human Services, 690 F.2d 252 (D.C. Cir. 1982) 19

Statutes, regulations and rule:

Freedom of Information Act, 5 U.S.C. 552:

5 U.S.C. 552 2

5 U.S.C. 552 (a) (6) (a) 5

5 U.S.C. 552 (b) (1) 8, 15

5 U.S.C. 552 (b) (5) 8

5 U.S.C. 552 (b) (6) 7-9, 17, 22

5 U.S.C. 552 (b) (7) 8

Executive Order 12,356, 47 Fed. Reg. 14,877 (April 2, 1982) 2, 15, 22

Fed. R. Civ. P. 8 (c) 2, 11

Miscellaneous:

Country Reports on Human Rights Practices for 1985, U.S. Department of State, 99th Cong., 2d Sess., at 579 (Jt. Comm. Print 1986) 6, 7, 17

Miscellaneous - Continued: **Page:**

2 HAITI Insight, 1 (No. 6, Nov./Dec. 1990) 13

Influx of Haitians puzzles U.S. officials; Calm seas or stormy politics: Everyone has an explanation (Dec. 31, 1984) *Miami Herald* 5

Is Duvalier Really Gone?, Vol. XX, 60 Minutes, (No. 7, Nov. 1, 1987) 13

Office of Chief Counsel For Prosecution of Axis Criminality, Nazi Conspiracy and Aggression, *United States v. Goering*, (Supp. A 1947) 22

G. Orwell, *Nineteen Eighty-Four*, app. (1949) 22

United States Government Information Policies and Practices--The Pentagon Papers, Hearings before a Subcommittee of the House Committee on Government Operations, 92d Cong., 1st Sess. 16

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 908 F.2d 1549, and reprinted in the Appendix to the Petition. (Pet. App. 1a-24a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provision of the Freedom of Information Act, 5 U.S.C. § 552:

> "(6)(a) Each agency, upon any request for records * * * shall–
> (i) determine within ten days (excepting Saturdays, Sundays and legal public holidays) after the receipt of any such request whether to comply with such a request and shall immediately notify the person making such request of such determination and the reasons therefor * * *"

Relevant language from Rule 8 (c) Federal Rules of Civil Procedure:

> "In pleading to a preceding pleading, a party shall set forth affirmatively * * * any other matter constituting an avoidance or affirmative defense. * * *"

Relevant language from Executive Order 12,356, 47 Fed. Reg. 14,877 (April 2, 1982):

§ 1.6. Limitations on Classification.

> (a) In no case shall information be classified in order to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; * * * or to prevent or delay the release of information that does not require protection in the interest of national security."

STATEMENT

Petitioner United States Department of State has been propagandizing the public, especially the Haitian immigrant community in the United States, that Haitians who have fled from Haiti and then are sent back by the United States government are neither persecuted nor do they face mistreatment. The propaganda suggests that political repression in Haiti is non-existent. The State Department's message is in total conflict with virtually all world-wide media reports of widespread imprisonment, torture, and murder of opponents of the Haitian Government - Duvalier's henchmen - and random machine-gunnings in places perceived to be anti-government from voting booths to cathedrals.

When Respondents filed Freedom of Information Act requests for the facts upon which Petitioner based its apparently false propaganda, the State Department failed to honor those requests. Only after the district court ordered it to disclose the secret facts upon which it based its propaganda did the State Department first claim that to release the information could endanger our "national security".

The State Department's publicity program is documented in several telegrams from the American Embassy in Haiti to the Secretary of State in Washington, in 1984 and 1985. R2-45 EX.2, 4, 9, 11.

State Department telegrams pleading for assistance in spreading the Department's party line - that returned Haitians have not been mistreated - were also sent to officials in the U.S. Immigration and Naturalization Service. For example, a February 1984 telegram states:

> " * * * * many Haitians in the US believe that they would be mistreated or persecuted should they return to Haiti. Such is not the case, as the Department knows.

> Publicity on the effective returnee follow-up program would be particularly helpful in Miami and New York since many Haitians currently in Detention there do not return voluntarily to Haiti for fear of what awaits them on their return.
>
> To meet this problem, the Embassy proposes that the Department seek a suitable opportunity to present the facts to the target audiences concerned. * * *
>
> Our objective here is to present the facts to the Haitian community in the US with a view toward facilitation the decision to return by Haitians who truly want to return to their families here but are deterred by false information foisted on them for political reasons."

R2-45-EX2-3.[1]

The director of the Miami Immigration and Naturalization Service (INS) District was reported to have "offered to provide names of 600 Haitians who have been sent back" by U.S. authorities and have not received any mistreatment or persecution by the Haitian government, according to a March 12, 1985 *Miami News* editorial. The publicized offer to provide the Haitians' names was "so that doubters can go to Haiti and speak to the people directly." (R1-1-EX.A).

Relying on the INS district director's publicized offer, respondent Michael D. Ray (Ray) filed a Freedom of Information Act (FOIA) request in the Miami INS District seeking the names of those 600 Haitians who allegedly had

[1] But see the June 26, 1986 telegram from the Embassy in Port Au Prince to the State Department suggesting termination of the interview program. ("* * * [g]iven four years of uniform failure to find any underpinning for the original concerns about migrant motivations and welfare, we believe the returnee followup program is no no longer a justifiable use of funds or manpower and should be terminated.") An authenticated copy of this telegram was presented to the court of appeals in [Respondents'] Request to Take Judicial Notice, (May 21, 1990).

not been persecuted nor mistreated. Ray's request was received by INS on March 18, 1985.

Seventy-four (74) days later[2], the INS' response to Ray's FOIA request claimed that "[w]e have made a complete search for the records that relate to your request and none were found." The INS response also maintained that the district director "has stated that he was misquoted by the Miami News." (R1-36-EX.B).

The Immigration and Naturalization Service "routinely sends inspectors to interview people who have been returned by American authorities" according to remarks attributed to an INS spokesman in a front page banner headline story, *Influx of Haitians puzzles U.S. officials; Calm seas or stormy politics: Everyone has an explanation* (Dec. 31, 1984) *Miami Herald*.[3] (R1-1-EX.F).

Ray filed a Freedom of Information Act request with INS seeking reports of these "routine" INS inspectors' interviews. (Feb. 28, 1985). INS' response was that "you should submit your request to the State Department, Washington, D.C." (R1-1-EX.G).

As directed by INS, Ray then filed his Freedom of Information Act request with the State Department. (June 15,

[2] This delay is not authorized under the Freedom of Information Act which states that upon receipt of a request for records an agency "shall determine within ten days" whether to comply and "shall immediately notify" the requester. 5 U.S.C. 552 (a) (6) (a).

[3] The spokesman later filed a declaration stating that he, too, had been misquoted (R1-13-EX.B) which declaration was specifically rebutted by the Miami Herald reporter who had attributed the remarks to the INS spokesman, and who swore to the accuracy of his story in deposition. R1-25-15,16.

1985). (R1-1-EX.H).[4]

After waiting for more than seventeen (17) months for the required 10-day response from the State Department to his June, 1985 Freedom of Information Act request[5] Ray filed this lawsuit in the Southern District of Florida in November 1986, seeking an order compelling release of the records which he had requested and which he contended were being improperly withheld in violation of the Freedom of Information Act. Specifically, Ray was seeking the alleged 600 names of Haitians who had been returned to Haiti without facing any mistreatment or persecution,[6] which information would establish whether the State Department interviews were, in fact, ever conducted. R1-1.

In order to escape judicial review the government cited their in-house propaganda to prove their public propaganda. Specifically, the government defendants, including the petitioner State Department all moved to dismiss and attached their own *Country Reports on Human Rights Practices for 1985*,[7] as evidence in support of their allegations that the "number of Haitian returnees referred to (600) [by the Miami INS district director in the *Miami News* editorial] that have not

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[4] Respondents JEAN HEVIL LOISEAU and YVON NICOLAS submitted a similar - but not identical - Freedom of Information Act request to the State Department which was received on May 8, 1987.

[5] See: n.2, infra.

[6] An allegation completely contrary to continuing world media reports including those in New York Times and aired on CBS' 60 Minutes. See: e.g. [Respondent's] Request to Take Judicial Notice, No. 89-5375 (11th Cir. May 21, 1990) containing news accounts: "Florida Center Holding Aliens Is Under Inquiry: Additional Complaints Made About Abuse", N.Y. Times, May 16, 1990, at A8, col.1 ("The Haitian Government had detained at least 29 Haitians who had been deported from Miami over the last 10 days, said American officials * * **.).

[7] U.S. Department of State, 99th Cong., 2d Sess., at 579 (Jt. Comm. Print 1986).

suffered persecution is confirmed by U.S. Embassy interviews of 582 returnees to Haiti". (R1-10-5).

The relevant passage from the State Department's *Country Reports* states:

> Follow-up trips to the Haitian countryside by the Creole-speaking returnee officer of the U.S. Embassy continue to demonstrate * * * that the Government is honoring its commitment not to harass or persecute Haitians who have illegally left the country and then been returned. In the first 9 months of 1985, *582 returnees were interviewed and no one alleged persecution or intimidation by the Haitian government.*

R1-10-EX.at 579 (emphasis added).

Ultimately, more than two years after Ray's Freedom of Information Act request was received by the State Department, more than seven months after Ray filed this lawsuit, and after a careful review by its Classification/Declassification Center, the State Department released documents in response to Ray's request in July, 1987. State Department claimed exemption from disclosure for seventeen of the 25 documents released on the sole basis of 5 U.S.C. § 552 (b)(6) which exempts only: "personnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

Again, nearly four months later "the Department of State carefully reviewed the seventeen documents" (which purportedly had only withheld names and other identifying information) and released some additional information. All but one of the seventeen documents were originally and currently "UNCLASSIFIED" according to the October 1987 declaration of John Eaves, the Acting Deputy Director of the Office of Mandatory Review of the Classification and Declassification Center in the State Department. R2-52-EX.1

The trial court Ordered the unredacted documents to be disclosed within fifteen days because the court found State Department's (b)(6) privacy exemption claim was outweighed by the public interest and thus the balance tilts in favor of disclosure (See Pet. 28a-29a).

Yet, on the day after the trial court's disclosure deadline when the unredacted documents were to have been released, the State Department *for the first time* raised "national security" as a basis for failing to comply with the trial court's order, and as a new reason for withholding the redacted information. The State Department raised four new claims of exemption.[8]

The trial court ordered the parties to "be prepared to argue whether the Government waived any entitlement to [these new exemptions] by failing to invoke these exemptions prior to the issuance of" the district court's order compelling disclosure.[9] The district court held a hearing and asked the

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[8] The four new exemptions the State Department claimed were: **1.** Exemption (b)(1): matters that are "specifically authorized under criteria established by Executive order to be kept secret in the interest of national defense or foreign policy and (b) are in fact properly classified pursuant to such Executive order" 5 U.S.C. § 552 (b)(1); **2.** Exemption (b)(5): "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" 5 U.S.C. § 552 (b)(5); **3 & 4.** (b)(7) "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (C) could reasonably be expected to constitute an unwarranted invasion of a personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source. 5 U.S.C. § 552 (b)(7)(C),(D).

[9] R4-96. The district court also ruled in this Order that "the Government shall supplement the record as necessary to include affidavits containing the requisite specificity to support each claim of exemption. See: e.g. Lesar v. U.S. Dept. of Justice, 636 F.2d 472 (D.C. Cir. 1980)." Id. The government failed to file any new affidavits.

State Department's attorney why the government had not raised these new exemptions sooner.

> THE COURT: "Are you suggesting to me that the Government has just recently decided that release of these 17 names will jeopardize the treaties, and the Government and national security.
>
> As I review this record the defendants, as long--the Government, as long as back as October 6th, 1987, requested additional time to justify the claimed exemptions.
>
> MS. JEANDHEUR: I believe the claimed exemption was the exemption 6.
>
> THE COURT: Why didn't they consider these others back that long?
>
> MS. JEANDHEUR: *There was no attempt to*. I don't believe they short changed this case at all. There was review of the documents, but it was only when the documents were [ordered to be] released that *an official at a high enough level who was able to see the more global implication* of the releases of this document, reviewed the information and realized the policy concerns involved in such a release." * * *
>
> THE COURT: * * * It is really not a reconsideration because of any mistake that was made, or any error that I made that they wanted.
>
> MS. JEANDHEUR: That is right."

2SR-3-5 (emphasis added).

Significantly, the State Department attorney agreed with the district court that there was no mistake in failing to classify the documents. Contrariwise, the government's brief to the court of appeals stated that "the failure to raise the exemption was due to 'pure mistake'" and "[w]hat happened here was

the result of pure mistake."[10]

The State Department had *again* decided to re-review the documents to see "if the information withheld from the documents met the criteria for classification". This newest re-review resulting in security classification was conducted by an official with the exact *same title and security clearance*[11] as the officer who had previously determined that the documents were not classsified.

The trial court denied the State Department's motion for reconsideration of its disclosure order, finding the State Department's delay in presenting the additional claims of exemption and new arguments "wholly unfounded". (Pet. 32a). The trial court succinctly summarized the merits of the government's position and of its stance before the court:

> The government has failed to point to any set of facts that would make this an "exceptional" case such that the waiver doctrine should not apply *See Jordan* at 780. Indeed, by its own admission at oral argument, the government agreed its motion contains nothing more than "new material." Thus, in its prior Order this Court did not overlook any basis in the record which would require a different conclusion. The government has only attempted to "*play cat and mouse by withholding its most powerful cannon until after the district court has decided the case and then springing it on surprised opponents and the judge.*" *Senate of the Commonwealth*, 823 F.2d at 580, *quoting Grummman Aircraft Engineering Corp. v. Renegotiation Board*, 482 F.2d 710, 722 (D.C. Cir. 1973).

Pet. 32a-33a (emphasis added).

[10] See: Initial Brief for the Government Agencies, 19 and 45 89-5375 (11th Cir. Jan. 22, 1990). The State Department also assured the Eleventh Circuit that "review of the record, even with the aid of a microscope, will not reveal even the slightest scintilla of a suggestion that the government's predicament was caused by other than a 'pure mistake'" Reply Brief for the Government, 12 (Mar. 15, 1990).

[11] John Eaves - Acting Deputy Director of the Office of Mandatory Review of the Classification and Declassification Center in the State Department.

The court of appeals affirmed. (Pet. App. 1a-24a). The court of appeals also considered the years of government delay before the State Department attempted to even assert the protection of additional exemptions, as constituting a waiver of the right to raise the exemptions. The Eleventh Circuit stated:

> We find it difficult to believe that the redacted information implicates compelling national security concerns in light of the government's failure *for almost two full years* to bring these concerns to the attention of the court or the plaintiffs. We find no circumstances in this case that warrant not applying the fundamental rule that a defendant "must allege all affirmative defenses in a responsive pleading and the failure to do so will normally result in waiver."[12] *Chilivis v. Securities and Exchange Comm'n*, 673 F.2d 1205, 1208 (11th Cir. 1982).

Pet App. 14a. (emphasis in original).

The State Department petitioned for rehearing, and also suggested the Eleventh Circuit rehear this case *en banc*. Not one single Eleventh Circuit judge considered that the decision was incorrectly decided or that the case was significant enough even to request a poll of the other judges on the government's petition. Pet. App. 35a.

[12] See also: Fed.R.Civ.P. 8 (c).

The State Department requested a stay of the Eleventh Circuit's order requiring the release of the documents within 15 days of the entry of the Eleventh Circuit's order. The government requested a stay pending an opportunity for review in this Court. The decision of the Eleventh Circuit panel is significant and reveals the court's thinking about the government's conduct in this case:

> "* * * After weighing all of the factors involved, including the past conduct of the government in this matter, we grant the conditional relief set forth herein.
>
> The government shall file immediately with the clerk of this Court all of the redacted information ordered released. The clerk is instructed to hold this information under seal until further order of the Court. Should the government fail to file the redacted information with the clerk of this Court by noon on Tuesday September 4, 1990, the request for a stay is denied. * * *"

Order of Stay, (11th Cir. Aug. 31, 1990).

The government managed to timely deliver certain documents under seal to the clerk of the Eleventh Circuit where they remain.

REASONS FOR DENYING THE WRIT

The State Department has attempted to monopolize the debate on an issue of great public importance through its publicity campaign - a campaign based on secret information which it still refuses to disclose. Further, the government relies on its secrets to prove there is no political bloodshed in Haiti, in contrast to virtually all reports by world-wide observers, from the *New York Times* to CBS' *60 Minutes*, and the United

Nations.[13] With the information respondents requested and the courts below have ordered the government to disclose, respondents will be able to determine whether the State Department's public relations program is based on truth.

Disinformation & Propaganda Program Improper for National Defense-Foreign Policy Exemption

This Court in *Department of Justice v. Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468 (1989), reiterated the philosophy embodied in the Freedom of Information Act, and warned that if we forget history we are doomed to relive it:

> " 'The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know *what their government is up to*.' "

109 S.Ct. at 1481 (emphasis in original, citations omitted).

Congress did not intend to permit the Executive to use the "national security" exemption to escape compliance with the Freedom of Information Act. The record here establishes that

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[13] See e.g. "Is Duvalier Really Gone?", Vol. XX, 60 Minutes, (No. 7, Nov. 1, 1987), and more recently Vol. 2 HAITI Insight, 1 (No. 6, Nov./Dec. 1990) ("Haunting the electors' memories is the experience of November 1987, when scores of would-be voters were slaughtered as they approached the polls, and the elections were cancelled by the military government in favor of fraudulent elections seven weeks later. In the months leading up to November 29, 1987, two presidential candidates and hundreds of ordinary Haitians were killed, and the electoral council's offices were burned to the ground. * * * almost 700 monitors representing the United Nations and the Organization of American States who will be monitoring the elections [in attempts to avert violence] * * *").

the State Department has conducted a propaganda campaign to further the State Department's objectives.[14] For the Judicial Branch to allow the Executive to simply classify documents in violation of Executive Order, in its efforts to resist disclosure of documented State Department wrong-doing would permit the Freedom of Information Act to become a "shambles". As Justice Douglas stated in another FOIA case:

> "[A]s has been revealed by such exposés as the Pentagon Papers, the My Lai massacres, the Gulf of Tonkin 'incident,' and the Bay of Pigs invasion, the Government usually suppresses damaging news but highlights favorable news. In this filtering process the secrecy stamp is the officials' tool of suppression and it has been used to withhold information which in '99½%' of the cases would present no danger to national security."

EPA v. Mink, 410 U.S. at 108-09 (Douglas, J., dissenting) *quoting Gravel v. United States*, 408 U.S. 606, 641-642 (1972) (Douglas, J., dissenting).

Justice Douglas's analysis is appropriate to this case, since by the government's own admission "there was no attempt to" use the secrecy stamp until after the district court had ordered disclosure.[15] In response to the ruling in *EPA v. Mink*, Congress amended the national defense/foreign policy (b)(1) Exemption to provide for judicial review when the Executive makes a claim that documents are classified and thus, exempt from disclosure.

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[14] See: supra, at 3-4.

[15] See: supra, at 9.

Executive Order Outlaws Cover-ups Like State Department's

The current FOIA text requires that such claims of "secret" be "in fact properly classified pursuant to Executive order" 5 U.S.C. 552 (b)(1)(B).

Currently, Executive Order 12356, (47 Fed. Reg. 14874) issued by President Reagan in 1982 controls such claims under Exemption (b)(1). However, § 1.6 states that:

> *"In no case shall information be classified in order to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization or agency;* to restrain competition; *or to prevent or delay the release of information that does not require protection in the interest of national security".*

(emphasis added).

Yet, such is precisely what has been done by the State Department here. By President Reagan's Order, at least three of these grounds prohibit security classification of the documents in this case.

Therefore, even were this Court to countenance the State Department's more than two-year delay in asserting the (b)(1) exemption, the Executive order prohibits the State Department's attempts at a cover-up, and the documents must still be disclosed.

The State Department's attempt to use the "secret" stamp to cover-up the agency's dirty work is not without precedent. Justice Douglas observed:

> [t]he Government seeks to escape from the Act by making the Government stamp of "Top Secret"

> or "Secret" a barrier * * * whether or not factual information contained in the document is in fact colorably related to interests of the national defense or foreign policy. Yet anyone who has ever been in the Executive Branch knows how convenient the "Top Secret" or "Secret" stamp is, how easy it is to use, and how it covers perhaps for decades the footprints of a nervous bureaucrat or a wary executive.

Environmental Protection Agency v. Mink, 410 U.S. 73, 108 (1973) (Douglas, J., dissenting).

Merely because an official in the State Department determined that a document may have "met the criteria for classification"[16] does not necessarily indicate that the document deserves to be exempted from disclosure because the official believes so. The late former Justice and former Ambassador to the United Nations Arthur Goldberg has stated: "I have read and prepared countless thousands of classified documents. In my experience, *75 percent of these documents should never have been classified in the first place; another 15 percent quickly outlived the need for secrecy; and only about 10 percent genuinely required restricted access over any significant period of time.*"[17]

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[16] See: supra, at 10.

[17] United States Government Information Policies and Practices--The Pentagon Papers, Hearings before a Subcommittee of the House Committee on Government Operations, 92d Cong., 1st Sess., pt.1, at 12. As quoted in Gravel v. United States, 408 U.S. at 642 n.9 (emphasis added).

The Eleventh Circuit's Balancing of Public Interest Against Privacy Interest Requires No Further Review

As required under this Court's pronouncements pursuant to FOIA Exemption 6, the district court conducted a balancing of "the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny'" *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976).

Applying that balancing test to the facts in this case, no facts have been shown or alleged that would lead any reasonable person to conclude that anyone's privacy would be harmed by release of the Haitians' names and addresses. There are only two reasonable possibilities raised by the government's invocation of the privacy issue.

The first possibility: if world media, Haitian refugees who flee their country in rickety boats at great peril, and Respondent Ray are correct, then political bloodshed in Haiti is a reality. Therefore, those Haitians returned to their homeland by the United States including the 582 Haitians referred to in the State Department's *Country Reports* - if any have survived - would have no concern for "privacy interests". Instead, these political refugees would want their status revealed in the hope that they could return to the United States as guaranteed by international and our own country's law.

The other possibility: if the State Department tells the truth that Haitians allegedly interviewed (whose names thus far have been kept secret at such extravagant government expense), live in a land where political repression is non-existent, then there is no reason in any of the State Department's arguments why those Haitians would object to such wonderful news about their homeland being given world-wide attention. They certainly would not claim that their "privacy" had been invaded. Indeed, as the trial court

remarked, "[i]t is hard for me to understand how they might expect retaliation from their government when the affidavits told how they were treated." SR2-10.

The district court clarified the balancing: "[t]he critical aspect is that an invasion [of privacy] be actual rather than just theoretical; it must be more than a mere possibility." (Pet. App. 28a) *citing Rose*, 425 U.S. at 380 n.19. The district court concluded that the legitimate public interest inherent in our country's immigration policy supports disclosure of the requested information. (Pet. App. 29a).

The Eleventh Circuit also conducted the balancing test, acknowledging privacy interests but finding that respondents' desire "to learn whether our government is honest to the public about Haiti's treatment of returnees * * * [is] of great public interest significant enough to outweigh the privacy interests of the Haitian returnees". (Pet App. 9a).

Both lower courts here considered in their balancing the State Department's alleged pledge of confidentiality. Both courts recognized that such a promise adds weight to the privacy interests at stake, but is not the controlling factor. (Pet. App. 7a, 28a). Both courts considered cases construing the pledge of confidentiality, and both still found the public interest here to be paramount.

Nevertheless, now the State Department would have this Court conduct yet another judicial balancing of the public interest against the privacy interests of the Haitians, and "suggests the [Eleventh Circuit] need[s] guidance from this Court in formulating a structured rather than an ad hoc approach to identifying and assessing the relevant privacy considerations." (Pet. 13).

The Alleged Pledge:
"Confidentiality"

Relying on a bald assertion that the interviews were allegedly conducted pursuant to a pledge of confidentiality, the State Department argues that the pledge ought to keep the names and identifying information exempt from the mandatory disclosure provisions of the Freedom of Information Act. (Pet. 13-15). Yet in the very case upon which the State Department relies the District of Columbia Circuit has recognized that "to allow the government to make documents exempt by the simple means of promising confidentiality would subvert FOIA's disclosure mandate." *Washington Post Co. v. U.S. Dep't of Health and Human Services*, 690 F.2d 252, 263 (1982).

In this context, where the State Department maintains that returned Haitians do not face mistreatment, the district court noted that if those interviewed stated that they were not mistreated, "[i]t is hard to understand how they might expect retaliation". 2SR-10 Therefore, any pledge of confidentiality is not determinative of the degree of privacy invasion, when no mistreatment was reported.

"Conflicting" Decisions
Do Not Conflict

The State Department places great reliance on *Nat'l Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873 (D.C. Cir. 1989) *cert denied* 110 S.Ct. 1805 (1990), because the *NARFE* court refused to order the disclosure of names and addresses of federal annuitants maintained in the files of the Office of Personnel Management. *NARFE* is readily distinguishable because the information to be released was essentially a mailing list, which the court found to be desireable as a commercial tool. The information would be "a list of qualified prospects for all the special goods, services and causes likely to appeal to financially secure retirees."

879 F.2d at 878.

The critical aspect of *NARFE* is that the court of appeals found "no public interest * * * and something, even a modest privacy interest, outweighs nothing every time." *Id.*
By contrast, here the Eleventh Circuit found that respondents here "have identified a very strong public interest". (Pet App. 13a).

The other case primarily relied upon by State Department is *FLRA v. Dep't of the Treasury*, 884 F.2d 1446 (D.C. Cir. 1989) *certs. denied*, 110 S. Ct. 863, and 864 (1990). There, too, the D.C. Circuit found that even though the public interest was slightly more than the "absolute zero" in *NARFE*, it did not rise to a level high enough to outweigh the federal workers' "significant interest in privacy". 884 F.2d at 1452, 1453.

The State Department also suggests that the Eleventh Circuit ruling here conflicts with *Heights Community Congress v. Veterans Administration*, 732 F.2d 526 (6th Cir.) *cert. denied*, 469 U.S. 1034 (1984). However, the Sixth Circuit found that the information requested in *Heights* was available from "other less controversial avenues to obtain the desired information." 732 F.2d at 530. No alternative avenues are available to obtain the information in this case.

The redacted portions of the documents are the only method to determine "what the government is up to" in this matter. Is the State Department disseminating propaganda to the public about the possible torture and murder of the Haitian returnees? Has the State Department concocted these "interviews" in order to justify its foreign policy goals, and to circumvent domestic and international refugee law?

Is the State Department being honest with the public when it states that it has conducted interviews with hundreds of Haitian returnees? Is the State Department credible when it states that the government of Haiti is honoring its commitment

not to persecute those Haitians whom the United States returns to the Haitian authorities? Is the State Department picture of political freedom in Haiti consistent with murders at the polling places, and the rest of the horrors known to world observers of the Haitian political scene?[18] Apart from "glib government assertions"[19] in the self-serving declarations of two State department employees, there is no evidence in this record, or anywhere to which respondents have access, to determine whether pledges of confidentiality were ever made.[20]

The release of identities of those people the State Department allegedly interviewed will provide either confirmation or concrete refutation of the State Department's broad public relations claims. Without these names and addresses, the State Department will have achieved a major public relations *coup*. The State Department will have succeeded in encouraging the media to report the State Department's message, and in denying the public the only opportunity to determine whether the State Department has been candid and told the American public, and the world, the truth.

Thus, by simultaneously stifling any real debate on the State Department's publicity campaign by denying public

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[18] See: e.g. n.13, supra.

[19] See e.g.: Perry v. Block, 684 F.2d 121, 126 (D.C. Cir. 1982) (Reliance on affidavits to demonstrate agency compliance with FOIA does not require courts to accept "glib government assertions".)

[20] The references to the alleged confidentiality pledge are sketchy. On this point the declaration of John Eaves states only that "those who were interviewed consented to the procedures with the understanding that their conversations with Embassy officers would be conducted under conditions of privacy and confidentiality." R2-52-EX at 4-5 ¶ 8. Similarly, the declaration of Richard H. Melton merely states that these persons were interviewed "on the understanding that their identities would be kept confidential. The interviewees generally were informed that the purpose of the follow-up interviews was to monitor the well-being of returnees." R4-88-5 ¶ 7.

access to the only method of verification and then disseminating the official State Department version of the truth, the spirit of the Freedom of Information Act is effectively extinguished.

The Eleventh Circuit Properly Determined State Department's More Than Two-Year Delay In Asserting Exemptions Amounted To A Waiver

The Eleventh Circuit recognized that the State Department had simply raised a smoke screen to hide behind, and this Court need not allow the State Department yet another opportunity to deceive the public simply by invoking the magical incantation "national security". Such "Newspeak"[21] bears the hallmark of a dictatorship[22] - not a democracy.

The State Department suggests that its unauthorized classification[23] of the documents in this case "constituted an intervening change in the governing factual and legal context of the case that warranted modification of the district court's injunctive order requiring disclosure." (Pet. App. 28-29)
Thus, the State Department tries to convince this Court that when the district court ruled that the Exemption 6 claim did not justify withholding in this case, this ruling triggered the

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[21] See: e.g. G. Orwell, Nineteen Eighty-Four, app (1949) ("The Principles of Newspeak").

[22] "Lying has always been a highly approved Nazi technique. Hitler in 'MEIN KAMPF', advocated mendacity as a policy. Von Ribbentrop admits the use of the 'diplomatic lie'. . . . Even Schacht showed that he, too, had adopted the Nazi attitude that truth is any story which succeeds. . . . he declared in justification-- 'I think you can score many more successes when you want to lead someone if you don't tell them the truth than if you tell them the truth.'" Office of Chief Counsel For Prosecution of Axis Criminality, Nazi Conspiracy and Aggression, United States v. Goering, at 43, 44 (Supp. A 1947); Closing Address for the United States of America, by Justice Robert H. Jackson. (emphasis added, footnotes omitted).

[23] See Executive Order 12356, § 1.6.

attempt to classify the documents, hence - abracadabra - the factual and legal context had changed!

The State Department seeks to have this Court ratify its pernicious approach to the Freedom Of Information Act to allow it to hide the "secret" stamp up its sleeve, so that if the district courts rule against it, State then can stamp the document(s) "secret". Then despite a district court's disclosure order, we have a new "Freedom of Secrecy Act".

The late Justice Stewart recognized that with the people and their representatives "reduced to a state of ignorance, the democratic process is paralyzed." He noted that Congress had initially "built into the Freedom of Information Act an exemption that provides no means to question an Executive decision to stamp a document 'secret,' however cynical, myopic, or even corrupt that decision might have been." *EPA v. Mink*, 410 U.S. at 95 (Stewart, J. concurring).

Congress swiftly remedied what Justice Stewart called the "blind acceptance of Executive fiat." *Id.* We now have the Judicial Branch determine whether the Executive has complied with the prerequisites for a FOIA Exemption 1 claim. Here, both the district court and the court of appeals determined that by failing to assert the exemption sooner, the State Department waived the right to assert the exemption. (Pet. App. 13a-14a, and 32a).

The government seeks this Court's endorsement of its deliberate tactical decision to wait to classify the documents here until after the district court had ruled that State Department's other exemption claim was unwarranted. The State Department notes that unlike *Jordan v. Dep't of Justice*, 591 F.2d 753 (D.C. Cir. 1978) (en banc), the government here "did not invoke Exemptions 1 and 7 for the first time on appeal" (Pet. at 27, n.11). The government suggests by this argument that its conduct here "therefore was an occasion for even greater flexibility than *Jordan* might otherwise provide." *Id.*

Yet the court of appeals here considered *Jordan*, and found it did not apply here because *Jordan* provides "an appellate court has the discretion to reach the merits of a FOIA exemption not raised before the district court if the failure to raise it was due to pure mistake, the value of the material is very high, and it appears highly likely that the exemption does apply." (Pet App. 14a). The government has not met its very difficult burden under *Jordan*.

Even if the State Department had met the *Jordan* test, such post-ruling exemption claims are still a matter of discretion with the court. Both courts below considered the government's more than two-year delay here, and determined that the State Department was not entitled to have its untimeliness excused.

Ample Opportunities Will Exist For This Court To Revisit The Issues Presented Here After Other Courts Consider And Apply The Recent *Reporters Committee* Decision

The care with which the court of appeals considered the complex issues in this unique case militates against the grant of certiorari. The court of appeals did not make a blanket ruling affecting all cases where names and addresses are sought. This case is not like *NARFE*. The Respondents here are attempting to find out what our government is up to - whether State Department is lying to the public and sending political refugees back to possible torture and death and whether, in fact, State Department interviewed anyone - not simply to solicit membership in an organization as in *NARFE*.

In time, different factual situations will arise in the other circuit courts which have not yet had occasion to apply this Court's teachings in *Reporter's Committee*, and could provide a simpler vehicle to provide the guidance which the State Department seeks.

The State Department's arguments that the Eleventh Circuit has failed to follow this Court's decision in *Dep't of Justice v. Reporters Committee for Freedom of the Press, infra*, is belied by the Eleventh Circuit's ruling. The Eleventh Circuit carefully and painstakingly distinguished the differences between the cases. (Pet. App. 10a-12a).

The information sought in *Reporters Committee* did not shed any light on the government's conduct. Here, by stark contrast, the information would illuminate the State Department's conduct in its self-proclaimed "publicity" program and its thus-far secret "interviews".

Unless the government proposes to initiate a new style in its future Freedom of Information Act litigation of "withholding its most powerful cannon until after the the district court has decided the case and then springing it on surprised opponents and the judge" - as it has in this case - this Court would not need to expend its limited resources in order to determine the question of waiver.

As Justice Douglas cautioned, we should not forget the words of Madison:

> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors must arm themselves with the power which knowledge gives"[24]

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[24] Letter to W.T. Barry, Aug. 4, 1822, 9 The Writings of James Madison 103 (Hunt ed. 1910), as quoted in EPA v. Mink, 410 U.S. at 110-11 (Douglas, J. dissenting).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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